In the present case, although the document is silent as to whether the deposit was paid as earnest money, I am of the view that having regard to the nature of the agreement (it being a minor contract within a main contract which is yet to be executed), it is the intention of the parties that the $4,000 should be treated as earnest money. Condition 5 provides that "the required deposit has to be paid on the acceptance of this application"; and condition 6 makes it clear that "the deposit cannot be withdrawn or refunded and shall be forfeited to the company on the applicant's failure to proceed with the proposed purchase". In the instant case, there is no stipulation that the amount paid by the appellant is in the form of a pre-determined liquidated damages or should be forfeited to account for damages for breach of contract. In *Jagathesan's* case at page 257 where the money was paid "by way of deposit and part payment", the following observation was made by Ong C.J.:

"Clause 5 not only failed, again, to distinguish between deposit and part payment, but went further than providing merely that the sum named shall be forfeited."

In the present case, however, the money is never referred to as part payment although, had the main contract been executed, the amount would become part of the purchase price. As provided by Lord Shaw in the Privy Council case of *Chiranjit Singh* v. *Har Swarup*: [5]

"Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."

Under the circumstances, I hold that the deposit of $4,000 was paid as earnest money.

In the present case, I am satisfied from the evidence that it was the appellant who was unwilling to enter into the main contract to complete the bargain. Although the respondent had first written to him on May 12, 1965 followed by two other letters, the appellant made no reply till March 30, 1966 in which he, for the first time, complained of undue delay by the respondent and demanded a refund of his deposit. Counsel for the appellant, however, argued before me that the appellant was dissatisfied with the terms of the proposed agreements which the respondent had requested him to execute. At all relevant times prior to the trial, the appellant had never seen the two proposed agreements. Therefore, I think it is reasonable to infer that the appellant's refusal to perform his part of the bargain was not due to his alleged dissatisfaction with the terms of the proposed agreements, but must have been due to financial difficulties or other reasons.

If I am wrong in concluding that the $4,000 was earnest money, I think the respondent is still entitled under section 75 of our Contracts (Malay States) Ordinance, 1950 to reasonable compensation not exceeding the sum of $4,000 (whether or not actual loss or damage is proved to have been caused) even if the stipulation as to forfeiture is held to be in the nature of a penalty. (See *Fateh Chand* v. *Balkishnan Das*, *ante*, and *Maula Bux* v. *Union of India*[6]). In the latter case, Shah Ag. C.J. had this to say at page 1959 paragraph 7:

"Forfeiture of earnest money under a contract for sale of property — movable or immovable — if the amount is reasonable does not fall within Section 74. That has been decided in several cases: *AIR 1926 P.C.1; Roshan Lal* v. *Delhi Cloth and General Mills Co. Ltd., Delhi,* (1911) ILR 33 All 166; *Muhammad Habibullah* v. *Muhammad Shafi,* ILR 41 All 324 = (AIR 1919 All 265); *Bishan Chand* v. *Radha Kishan Das,* (1897) ILR 19 All 489. These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."

Further, in *Jagathesan's* case, following the judgment of the Privy Council in *Murlidhar Chaterjee* v. *International Film Co. Ltd.*[7] it was held that section 65 of our Contracts (Malay States) Ordinance entitled the defendant/purchaser to restitution subject to a set-off for any damage which the aggrieved vendor had sustained. In the instant case, it is not in dispute that on July 13, 1964 the appellant agreed to purchase the property at the price of $49,720. According to the evidence of P.W.1 as corroborated by Exhibit D6, the property was sold to another buyer on June 19, 1968 at the price of $42,200. The respondent had, therefore, sustained a loss of $7,520. Under the circumstances, I am of the view that the respondent is entitled to set-off the $4,000 as damages under section 65 or, alternatively, to retain it as reasonable compensation under section 75 of the Ordinance.

This appeal is, therefore, dismissed with costs

Appeal dismissed.

Solicitors: *V. K. Palasuntharam; Chung & Huang.*

YONG BOOK FONG v. NALLAKARUPPAN CHETTIAR & ORS.

[O.C.J. (Mohamed Azmi) June 18, 1971]

[Kuala Lumpur — Civil Suit No. 813 of 1969]

Contract — Reimbursement of money paid by plaintiff to third person — Whether plaintiff interested in payment of money — When time begins to run — Limitation — Contracts (Malay States) Ordinance, 1950, s. 70.

The plaintiff gave an interest-free loan of $7,000 to the defendants and another person. He had raised the sum by borrowing the money from a Chettiar firm on the security of land belonging to him. The defendants had agreed to pay the interest on this loan. The defendants failed to pay the monthly interest and as a result the plaintiff had to pay the loan together with interest. He claimed reimbursement of the sum paid by him.

Held: (1) the plaintiff was a person interested in the payment of the money within the meaning of section 70 of the Contracts (Malay States) Ordinance, 1950 and, as a result of the defendant's failure to carry out their legal obligations, it was in the plaintiff's interest to pay off the loan in order to save his land from being foreclosed;

(2) the cause of action in this case under section 70 only arose when the plaintiff paid off the loan to the Chettiar

firm and not when the loan was made by the plaintiff to the defendants and therefore the action in this case was not statute barred.

Cases referred to:-

(1) *Ram Tuhul Singh* v. *Biseswar Lal* (1875) 2 I.A. 131.

(2) *Chettinad Bank Ltd. of Kuala Lumpur* v. *Sivagamippillay* [1934] M.L.J. 203.

(3) *Mt. Munni Bibi* v. *Tirloki Nath* A.I.R. 1932 All. 332.

(4) *Umed Singh & Anor.* v. *Bihari Lal & Anor.* A.I.R. 1922 Nag. 50.

(5) *Nasir* v. *Mesah* [1971] 1 M.L.J. 32.

(6) *Seman bin Taib* v. *Awang Ahmad* Federal Court Civil Appeal No. 85 of 1970 (Unreported).

(7) *Reeves* v. *Butcher* [1891] 2 Q.B. 509, 511.

CIVIL SUIT.

S. D. K. Peddie for the plaintiff.

W. H. Sault for the third defendant.

Cur. Adv. Vult.

Mohamed Azmi J.: This is a claim under section 70 of the Contracts (Malay States) Ordinance, 1950 for reimbursement of money which the plaintiff has paid to a third person.

The facts of the plaintiff's case are clearly set out in the statement of claim. Briefly, on or about July 21, 1962 the plaintiff gave an interest-free loan to the three defendants and one SP. Krishnappan Chettiar of the Kajang N.PR. Firm (hereinafter referred to as "the Kajang Chettiars") a sum of $7,000 for the purpose of enabling them to settle a judgment which had been obtained against them in Malacca High Court Civil Suit No. 11 of 1958 by one A.PR. Periakaruppan Chettiar — who should not be confused with PR. SP. Periakaruppan Chettiar, the third defendant in the present action. The plaintiff raised the $7,000 by borrowing the money from some chettiars in Muar operating under the name of PL.M. Firm (hereinafter referred to as "the Muar Chettiars") on the security of two pieces of land comprising in E.M.R. 8602 and E.M.R. 8604, Mukim of Kajang in the District of Ulu Langat. As managing partner of the Kajang Chettiars, the first defendant issued to the plaintiff a written acknowledgment of the $7,000 loan, in which the four partners, *inter alia*, undertook to pay the interest in the plaintiff's name payable every month to the Muar Chettiars. It is alleged that as a result of the failure of the Kajang Chettiars to pay the monthly interest payable to the Muar Chettiars, the plaintiff was obliged on December 7, 1967 to repay the loan together with interest amounting to $10,075 to the Muar Chettiars. He now claims, *inter alia*, for the reimbursement of the money paid to the Muar Chettiars.

In this case, only the third defendant is contesting the claim. The first defendant is already dead at the time of trial while the second defendant has not entered an appearance. The third defendant, however, did not adduce any oral evidence — a course which he is perfectly entitled to take. By his pleadings, the third defendant denied everything, including the alleged advance of $7,000 by the plaintiff. The only admission made is contained in paragraph 5 of the statement of defence wherein he admits the plaintiff's allegation that the Kajang Chettiars or anyone on their behalf did not pay the principal and the interest to the Muar Chettiars.

In my view, the main issues in this case are as follows: —

(1) Whether the plaintiff had lent $7,000 to the Kajang Chettiars; and, if so, whether the borrowing was done by the four Kajang Chettiars as individual partners or as a partnership of N.PR. Firm, of which they are partners.

(2) Whether all the money borrowed was utilised for the purpose of the said N.PR. Firm.

(3) Whether on the facts of this case the claim of the plaintiff comes within the ambit of section 70 of the Contracts (Malay States) Ordinance, 1950.

(4) Whether the claim is statute barred.

On the first issue there is ample evidence to support the plaintiff's contention that he had lent a sum of $7,000 to the Kajang Chettiars. The plaintiff's evidence is corroborated not only by documentary evidence but also by oral evidence to the effect that he had raised this sum by borrowing the said sum from the Muar Chettiars. Exhibit P16 dated July 21, 1962 clearly acknowledges the said loan from the plaintiff to the Kajang Chettiars and I have no reason at all to suspect the authenticity of this document. As to whether the borrowing was done by the four individual partners or by the partnership of N.PR. Firm, the acknowledgment and the undertakings contained in Exhibit P16 clearly established that the loan is by and for the partnership, as the document was signed and issued by the first defendant in his capacity as managing partner of the said firm. Learned counsel for the third defendant has conceded that a managing partner can borrow for the whole partnership but not for a few of the partners, and the present action is precisely the case where as stated in Exhibit P16 the first defendant as Managing Partner had borrowed the money from the plaintiff for all the continuing partners. As stated earlier on, the loan to the defendants is also corroborated by the money-lending transaction between the plaintiff and the Muar Chettiars on the same date. The evidence of Muthapalani (P.W.3), an agent of the Muar Chettiars, corroborates the testimony of the plaintiff on all material particulars. I am, therefore, satisfied that the plaintiff did on July 21, 1962 borrow $7,000 from the Muar Chettiars on the security of two pieces of land in Kajang with interest at the rate of twelve per cent per annum, and that this sum was immediately afterwards handed over to the first defendant by cheque. Incidentally, this borrowing by the Kajang Chettiars is also recorded in their books of accounts. (See Exhibit P14 produced by P.W.4, the Kajang N.PR. Firm's accountant).

The second main issue is whether the loan of $7,000 was utilised for the purpose of the Kajang N.PR. partnership. Learned counsel for the third defendant also concedes that, if the money was borrowed by the partnership and the money was utilised for the purpose of the partnership, then the third defendant as a partner is liable even if he personally was not a party to the borrowing. In this case, the document

Exhibit P16 (which has been produced by consent) speaks for itself. The translation of the document is in the following form: —

"Date 21.7.1962
Subakiruthu Year Aadi Month 6th date

Letter written and delivered to Chinese Yong Pok Pong residing at 16th mile Roko Road, Kajang by P.N.P. Nallakaruppan Chettiar, Managing Partner of N.PR. Firm residing at House No. 6 Main Street, Kajang.

P.N.P. Nallakaruppan Chettiar 1, P.N.P. Vairavan Chettiar 2, PR. SP. Periakaruppan Chettiar 3, SP. Krishnappa Chettiar 4, four persons, being the partners of N.PR. Firm are in need of money to pay and settle a decree balance of Malacca Civil Suit No. 11/58 payable to A. PR. Periakaruppan Chettiar of Malacca. On our asking you, you and your wife have borrowed for us $7,000 from PL.M. Firm of Muar by executing a bond on this date charging a grant of your rubber estate and a rubber estate grant in the name of your wife, in all two grants. For this sum of dollars seven thousand we ourselves shall pay interest every month to PL.M. of Muar in your name and obtain the receipts. This letter is executed as an undertaking that, when required by you, we shall pay the principal amount to PL.M. and shall discharge the bond and shall get back the grants belonging to both of you.

(Sd) P.N. Chettiar
Managing Partner,
N.PR. Firm.

(Sd) P.N.P. Nallakaruppan Chettiar.

30.7.62 Debit paid $1,000 (dollars one thousand only) towards principal.

(Sd) P.N.P. Nallakaruppan Chettiar Managing Partner, N.PR. Firm

20.6.67 Credit received on this date cash $600 (dollars six hundred only).

(Sd) P.N.P. Nallakaruppan Chettiar Managing Partner, N.PR. Firm

24.6.67 credit received on this date cash $400 (dollars four hundred only).

(Sd) P.N.P. Nallakaruppan Chettiar Managing Partner, N.PR. Firm."

Therefore, quite apart from oral evidence, the document clearly proves that the $7,000 loan by the Kajang Chettiars is for the purpose of settling a judgment in Malacca Civil Suit No. 11 of 1958. From the writ of summons in the Malacca case (Exhibit P10), the Kajang Chettiars were sued for $15,633.38 for money due under the terms and conditions of a deed referred to in paragraph 3 of the statement of claim as a supplemental deed. This supplemental deed is, in fact, the deed produced in court in the present case (Exhibit P6). Paragraph 2 of the statement of claim in the Malacca case also states that the Kajang Chettiars in the present action were being sued as "continuing partners of the firm formerly known as PR.A. but now known as N.PR. carrying on their business at No 6 Main Street, Kajang, Selangor...". It is, therefore, important to observe that the four partners of N.PR. Firm (*i.e.* the Kajang Chettiars) who borrowed money from the plaintiff were also the defendants in the Malacca case. Having regard to the evidence before me, I am satisfied that the money borrowed from the plaintiff was utilised for the purpose of the N.PR. Firm, and, as such, the third defendant being a partner in the partnership is liable to the plaintiff even if he personally was not a party to the borrowing. I am further fortified in my finding by circumstantial evidence adduced by the plaintiff. In this case, the acknowledgment by the Kajang Chettiars of the $7,000 loan from the plaintiff was dated July 21, 1962 (Exhibit P16) and the final settlement of the Malacca judgment was made about five days later, *i.e.* on July 26, 1962. (See Exhibits P7 and P8). From these facts, I think it can reasonably be inferred, having regard to the circumstances of this case, that the money borrowed from the plaintiff must have been used to satisfy the partnership's liability in the Malacca case. In any event, there is no rebutting evidence by the defence that the money was used otherwise.

It may be convenient at this stage to deal with the history of the N.PR. Firm, in view of the submission made by learned counsel for the defence that the claim should be dismissed if the court found that there were five partners in the said firm. Since only four partners were sued in the Malacca case, it is argued that the judgment in the Malacca case does not impose liability on the partnership but merely on the four individual partners, and, as such, it cannot be said that the $7,000 loan taken from the plaintiff is for the whole partnership. In my view, this argument does not hold water having regard to the history of the partnership as contained in the deed (Exhibit P6) and corroborated by the pleadings in the statement of claim in the Malacca case. It should be noted that, although Exhibit P6 is dated May 26, 1956, the recitals on the first page set out the circumstances of the partnership prior to that date. As stated earlier on, the cause of action in the Malacca civil suit is based on this deed, under which terms and conditions a sum of money was payable to one A.PR. Periakaruppan Chettiar (the plaintiff in that action) by the Kajang Chettiars as continuing partners. On failure of the continuing partners to make payment, the Malacca civil suit was instituted. Under cross-examination, Venkatachalam, the solicitors' clerk in Malacca (P.W.2), testified that prior to December 1952 PR.A. Firm had seven partners, namely:

(a) The four Kajang Chettiars;
(b) A.PR. Periakaruppan Chettiar, (plaintiff in Malacca civil suit);
(c) P.N. ST. Sithambaram Chettiar, (who died on March 8, 1954);
(d) PR.SP. Perumal @ Muthuraman Chettiar.

This is clearly set out in recital No. (1) of the deed (Exhibit P6). According to P.W.2, as a result of an arbitration award on December 8, 1952, two of the partners, namely partners (b) and (d) left the partnership. After that the remaining five partners continued with the partnership until the death of partner (c) on March 8, 1954, and, thereafter, the four remaining partners (the Kajang Chettiars) continued to carry on the business of the said firm with the consent and approval of the beneficiaries of the deceased partner, and this is also clearly set out in recital No. (3) of the deed. Under the circumstances, as the four remaining partners, that is to say the present three defendants and SP. Krishnappa Chettiar, are at all material times the continuing partners of the firm, it explains why only four of them were sued in the Malacca civil suit, which was filed on February 12, 1958 — about four years after the death of the deceased partner. In my view, the fact that the Registration of Businesses

shows that there were five partners in the firm in December 1952 cannot alter the fact that there were only four continuing partners when the Malacca civil suit was filed in 1958 and also when money was borrowed from the plaintiff in July 1962.

It should be noted that in this case the attorney of the third defendant executed the deed (Exhibit P6) and, therefore, the third defendant is clearly a party to the deed and cannot, in my view, disclaim liability of the undertakings contained therein, and, as stated earlier on, the judgment entered in the Malacca civil suit arose out of the deed. The evidence of the plaintiff also shows that the third defendant was present when the plaintiff handed the cheque of $7,000 to the first defendant at No. 6, Main Street, Kajang, and, again, according to the evidence of P.W.2, the third defendant was also present in the solicitors' office in Malacca when final payment was made in settlement of the Malacca judgment. The above evidence have not been rebutted in any way by the defence. I, therefore, come to the conclusion that the third defendant knew what was happening at all material times, and I cannot accept the contention that he had no knowledge of the fact that the Malacca decree, the borrowing from the plaintiff and the acknowledgment in Exhibit P6 relate to the partnership, of which he has all along been a partner.

The third issue to be decided is whether this claim comes within the ambit of section 70 of the Contracts (Malay States) Ordinance, 1950. Section 70 of the Ordinance, which is in *pari materia* with section 69 of the Indian Contract Act 1872, provides:

"A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."

As to the meaning of the words, "person . . . interested in the payment of money", Indian Contract and Specific Relief Acts by *Pollock & Mulla*, Eighth Edition, at page 414 has this to say:

"This section only applies to payments made *bona fide* for the protection of one's own interest. A person may be interested in the payment, but if in making the payment he is not actuated by the motive of protecting his own interest, he cannot recover under this section."

Further at page 415, the authors stated that "it is enough for a person claiming under the provisions of this section to show that he had an interest in paying the moneys claimed by him at the time of payment", and at page 417 the case of *Ram Tuhul Singh* v. *Biseswar Lal*[1] is cited where the Privy Council in dealing with the rights of parties making payments observed:

"It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be concluded by nice considerations of what may be fair and proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A.* of *B.'s* debts."

In the Malayan case of *Chettinad Bank, Ltd. of Kuala Lumpur* v. *Sivagamippillay*,[2] Prichard J. in dealing with section 69 quoted the following passage from *Mt. Munni Bibi* v. *Tirloki Nath*,[3] at page 333:

"There are numerous cases including a decision of their Lordships of the Privy Council in which it has been held in effect the words "a person who is interested" do not mean that the person who makes the payment must prove that he had such an interest as would stand the test of a judicial trial. The decisions point to the conclusion that all that is necessary for a person making a payment to recover is that he should really believe and honestly believe that he must make the payment in his own interest."

In the present case, the plaintiff cannot be said to have settled the debt with the Muar Chettiars voluntarily. Since the Kajang Chettiars had failed to pay the monthly interests from March 21, 1964, it is obviously in the interest of the plaintiff to repay the whole loan, unless he was stupid enough to allow the lands charged as security for the said loan to be foreclosed.

In the case of *Umed Singh & Another* v. *Bihari Lal & Another*,[4] *B* under contract with *A* promised to pay *C* to whom *A* owed money; then *A* made the payment on *B*'s failure and then sued *B*, and it was held that section 69 of the Indian Contract Act applied. In the course of his judgment, Hallifax A.J.C. said:

"I am unable to see any justification for the restriction placed upon the meaning of either of the two expressions used in section 69 of the Contract Act, though there appears to be some judicial authority for holding that a person legally bound to make a payment cannot be called a person merely interested in making it. But there is none at all for the proposition that the legal liability to pay, contemplated by the section in respect of the person who does not make the payment, is only such a liability as can be enforced by the person to whom the payment is to be made. Here the defendants were 'bound by law to pay' because they were legally bound to do so under their contract with the plaintiffs, and the fact that the plaintiffs, and the fact that the malguzar could not enforce this contract seems to me to have no bearing on the matter at all. To restrict the meaning of the plain words of the section in that way is to import many other words into it which the legislature could have put there but did not."

Similarly, in the present case, under the agreement Exhibit P16 the Kajang Chettiars, being partners, are "bound by law to pay" the monthly interest to the Muar Chettiars on behalf of the plaintiff, and from the evidence of the account books of the firm, I am satisfied that the defendants have failed to pay the monthly interest as from April 21, 1964; after which, according to the evidence of the plaintiff — which has not been contradicted — he was pressed for payment by the Muar Chettiars under the threat of the sale of the lands which he had charged to them as security. It was under this threat that the plaintiff said that he had to sell his land comprising in E.M.R. 8602, Lot No. 568, on October 23, 1967 to one Tan Beng through Mr. S. Y. Chan, advocate and solicitor, (P.W.1). Mr. S. Y. Chan corroborated the evidence of the plaintiff as regards the sale and he also supported the plaintiff's allegation that a sum of $10,075 was paid to the Muar Chettiars in settlement of the principal and interest for the discharge of the charge over the plaintiff's lands. Having regard to the evidence before me, I am, therefore, satisfied that the plaintiff is a person interested in the payment of money within the meaning of section 70 of the Contracts (Malay States) Ordinance, 1950 and that, as a result of the defendants' failure to carry out their legal obligations under the agreement (Exhibit P6), it was in his own interest that he had

to pay off the Muar Chettiars in order to save the lands from being foreclosed. I am equally satisfied that under the agreement (Exhibit P6) the defendants are legally bound to pay the monthly interest on behalf of the plaintiff which they failed to discharge. From the account book of the N.P.R. Firm (Exhibit P12), the defendants only paid interest to the Muar Chettiars from July 21, 1962 to March 20, 1964, totalling $1,400, and this is the amount referred to as "less paid to account" under particulars of interest in the statement of claim. After that, no further interest was paid by the defendants which is in breach of the agreement as contained in Exhibit P16.

The final issue to be decided is whether the present action is statute barred. The expressions "the right to sue accrues", "the cause of action accrues" and "the right of action accrues" have been held to mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run. This has been so stated in the judgment of Gill F.J. in *Nasri* v. *Mesah*[5] and reaffirmed by Ali F.J. in the recent case of *Seman bin Taib* v. *Awang Ahmad*.[6] The question in that case is when a cause of action arises. In *Nasri* v. *Mesah*, *ante*, Gill F.J. said at page 34:

"A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (*per* Lord Esher M.R. in *Read* v. *Brown* (1880) 22 Q.B.D. 128, 131).

The learned Federal Judge went on to quote the following passage from the judgment of Lindley L.J. in *Reeves* v. *Butcher*[7]:

"This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp* v. *Garland* (4 Q.B. 519) decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought."

If the plaintiff's claim is in respect of a normal money-lending transaction as alleged by learned counsel for the defence, then I would agree that if no time was specified for repayment, then time runs from the date of the loan. As the claim is based on contract, the claim is statute barred six years from July 21, 1962, *i.e.* date of the loan by the plaintiff to the defendants, by virtue of section 6 of the Limitation Ordinance 1953. However, although the present action is contractual in nature, the cause of action is based on the provision of section 70 of the Contracts (Malay States) Ordinance 1950, and time starts to run when the cause of action arises; and, in my view, the right to bring an action under section 70 in the present case only arises when the plaintiff paid off the loan to the Muar Chettiars which the defendants are bound to pay under the agreement (Exhibit P16). Therefore, the earliest time at which an action could be brought by the plaintiff was on December 7, 1967, being the date of settlement of the loan with the Muar Chettiars. (See Exhibit P3). As the present action was filed on May 27, 1969, the claim is clearly not statute barred

With regard to the contention of learned counsel for the defence that the plaintiff's wife should be brought in as a co-plaintiff, the short answer to the argument is that, although it is true that for the purpose of raising the loan of $7,000 one of the lands which was charged to the Muar Chettiars belonged to the wife of the plaintiff, to all intents and purposes the relevant loan transaction in the present case is between the plaintiff and the Kajang Chettiars. The basis of this action is Exhibit P16 and the document clearly states that the Kajang Chettiars undertook to pay the monthly interest to the Muar Chettiars in the name of the plaintiff. There is no similar undertaking by the Kajang Chettiars to do anything as far as the plaintiff's wife is concerned. As far as the payment of interest is concerned, the Kajang Chettiars were contracting with the plaintiff and this is made clear in Exhibit P16.

Since this is an action under section 70 of the Contracts (Malay States) Ordinance 1950, I think the plaintiff is only entitled to be reimbursed with the amount he had actually paid to the third party including other incidental expenses. I would, therefore, give judgment for the plaintiff against the second and third defendants in the sum of $10,075 and a further sum of $85 for incidental expenses, and costs. However, I make no order against the first defendant.

Order accordingly.

Solicitors: *Skrine & Co.; W. H. Sault.*

MOHAMED HUSIN v. SHUM YIP LEONG RUBBER WORKS LTD.

[O.C.J. (Yong J.) June 22, 1971]

[Kuala Lumpur — Civil Suit No. 49 of 1967]

Factories — Safe system of work — Co-worker — Negligence of.

Machinery — Accident — Report of — Breach of statutory requirements.

Negligence — Breach of statutory duty — Clicking press — Failure to provide a safe system of work — Whether volenti non fit injuria can be pleaded as a defence — Machinery (Driven Machinery) Regulations, 1959, regs. 3, 4 & 32.

Negligence — Contributory negligence — Mere inadvertence not negligence.

Damages — Personal injuries — Arm — Fingers — Amputation.

The plaintiff and one Mustakim were the operators of a clicking press. The plaintiff was working as a feeding operator and Mustakim was the machine operator. It was alleged that while the plaintiff was spreading powder on the rubber sheet Mustakim negligently caused the cutter to descend and cut the plaintiff's right hand, as a result of which four of his fingers had to be amputated.

Held: (1) the defendants had failed to provide a safe system of work for their workers and, therefore, the defendants and their servant Mustakim were negligent;

(2) there was in this case a breach of the Machinery (Driven Machinery) Regulations, 1959 as no guard or fence had been provided to the clicking press;

(3) such inadvertence as there was on the part of the plaintiff in this case did not go so far as to constitute contributory negligence on his part;